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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Enrique Ulises Ballesteros-Corral,)

CASE NO. CV-05-0740-TUC-FRZ
CR-04-1797-TUC-FRZ

10 Petitioner,)

ORDER

11 vs.)

12 United States of America,)

13 Respondent.)
14)
15)

16 Petitioner has filed a Motion "to Vacate, Set Aside or Modify and Correct Sentence
17 by a Person in Federal Custody, under Title 28 U.S.C. §§ 2255."

18 Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States
19 District Courts provides, in relevant part, that

20 [i]f it plainly appears from the motion, any attached exhibits,
21 and the record of prior proceedings that the moving party is not
entitled to relief, the judge must dismiss the motion and direct
the clerk to notify the moving party.

22 28 U.S.C. foll. § 2255.
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25 **Background**

26 Petitioner entered a plea of guilty to Counts One and Two of the Indictment. Count
27 One charged him with knowingly and intentionally importing cocaine into the United States,
28 in violation of 21 U.S.C. §§ 952(a) and 960(a)(1) and (b)(1)(B)(ii). Count Two charged him

1 with knowingly and intentionally possessing cocaine with the intent to distribute it, in
2 violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(ii)(II).

3 At sentencing, the Court reduced Petitioner's Adjusted Offense Level by 3 levels
4 because Petitioner met the safety valve requirements in United States Sentencing Guideline
5 (U.S.S.G.) § 5C1.2. The Court reduced Petitioner's Adjusted Offense Level by an additional
6 3 levels because of Petitioner's acceptance of responsibility. The Court imposed a sentence
7 of seventy-eight months.

8 9 **Discussion**

10 **A. Ineffective Assistance of Counsel**

11 **1. Ineffective Assistance in Plea Agreement**

12 It appears that Petitioner may be asserting a claim of ineffective assistance of counsel
13 relating to his decision to plead guilty. Petitioner alleges that "defense counsel
14 misrepresented and misadvised the plea to defendant about the condition of his plea bargain,
15 specifically inquired by defendant, in as much as counsel knew that defendant's whole
16 behavior and guilty plea was structured to avoid a plea agreement that would not result in a
17 long sentence or a prison time" and that Petitioner "rel[ied] on counsel's advice [and] pleaded
18 guilty to the charges."

19 When a defendant is represented by counsel during the plea process and pleads guilty
20 based upon the advice of counsel, the defendant can "'only attack the voluntary and
21 intelligent character of the guilty plea by showing that the advice he received from counsel'"
22 was outside "'the range of competence demanded of attorneys in criminal cases'" **and** was
23 prejudicial. *Hill v. Lockhart*, 474 U.S. 52, 56-59, 106 S. Ct 366, 369-70, 88 L. Ed. 2d 203
24 (1985) (quoting *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d
25 235 (1973), and *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed.
26 2d 763 (1970)). "[T]o satisfy the 'prejudice' requirement, the defendant must show that
27 there is a reasonable probability that, but for counsel's errors, he would not have pleaded
28 guilty and would have insisted on going to trial." *Id.* at 59, 106 S. Ct. at 370.

Petitioner does not specify what advice counsel gave that fell outside the range of competence for criminal attorneys. In addition, there was no plea agreement in this case and, therefore, it is unclear how counsel “misrepresented and misadvised the plea to defendant about the condition of his plea bargain.” Accordingly, Petitioner’s claim fails. *See Pollard v. White*, 119 F.3d 1430, 1435 (9th Cir. 1997) (Court “do[es] not have to evaluate both prongs of the [*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] test if the defendant fails to establish one.”).

2. Ineffective Assistance at Sentencing

a. Aberrant Behavior

Petitioner alleges that his counsel was ineffective at sentencing because his attorney failed to request a downward departure based on Petitioner’s aberrant behavior.

To prevail on a claim of ineffective assistance of counsel, Petitioner must show both that his counsel’s representation fell below an objective standard of reasonableness **and** that counsel’s deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

Petitioner was not entitled to a downward departure based on his aberrant behavior. Under U.S.S.G. § 5K2.20(c)(3), the Court *cannot* depart downward based on aberrant behavior if the offense is a “serious drug trafficking offense.” The Sentencing Commission defines a “serious drug trafficking offense” as “any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that provides for a mandatory minimum term of imprisonment of five years or greater, regardless of whether the defendant meets the criteria of § 5C1.2” U.S.S.G. § 5K2.20 n.1.

Petitioner was charged with, and pled guilty to, a serious drug trafficking offense. *See* 21 U.S.C. § 960(a)(1) and (b)(1)(B). Therefore, he was not entitled to a downward departure based on his aberrant behavior. The Court specifically stated at sentencing that Petitioner did not qualify for this departure because of the amount of drugs involved and Petitioner’s “open admission that he had done this once before.” Petitioner’s attorney’s failure to request

1 this departure did not prejudice the defense. *See Strickland*. Thus, this claim of ineffective
2 assistance of counsel fails. *See Pollard*.

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4 **b. Deportable Alien Status**

5 Petitioner alleges that his counsel was ineffective at sentencing because his attorney
6 failed to request a downward departure based on Petitioner's status as a deportable alien.

7 First, the Court was well aware at sentencing of Petitioner's status as a deportable
8 alien. Even if Petitioner's attorney had made the argument that the Court should depart
9 downward based on Petitioner's status as a deportable alien, this Court, in its discretion,
10 would not have departed downward. *See Lizarraga-Lopez v. United States*, 89 F. Supp. 2d
11 1166, 1170 (S.D. Cal. 2000) (concluding that defendant's "status as a deportable alien was
12 squarely within the 'heartland' of the Sentencing Guidelines and was specifically accounted
13 for in the early release statute"); *United States v. Martinez-Villegas*, 993 F. Supp. 766, 781
14 (C.D. Cal. 1998) (denying downward departure based on deportable alien status and noting
15 that "the Ninth Circuit has shown a reluctance to allow deportability status as a basis for a
16 downward departure"); *cf. United States v. Davoudi*, 172 F.3d 1130, 1133-34 (9th Cir. 1999)
17 (upholding district court's discretionary decision not to depart downward based on
18 deportable alien status).

19 Second, Petitioner notes that a "Memorandum to all Prosecutors (Federal)" dated
20 April 28, 1995, instructs federal prosecutors to recommend a one or two level downward
21 departure "in exchange for alien's concession of deportability." Petitioner has presented no
22 evidence that he agreed to accept a final deportation order. Nor does he address whether the
23 United States Attorney for this District has chosen to make a downward departure
24 recommendation in exchange for a such an agreement, or whether this ten-year-old
25 memorandum is still in effect.

26 Finally, to the extent Petitioner may be asserting an equal protection argument when
27 he asserts that "he will be confined to a higher security than a comparable American
28 counterpart on accounts of factors unrelated to moral worthiness and be subjected to more

severe punishment” because he “does not qualify for the BOP Drug Rehabilitation Program” and is required to spend “the last 10% of his sentence [in a deportation center rather than in] minimum security confinement,” the Court notes that the Ninth Circuit Court of Appeals rejected Petitioner’s argument in *McLean v. Crabtree*, 173 F.3d 1176 (9th Cir. 1999). In that case, the Ninth Circuit found that there was no equal protection violation and held that “excluding prisoners with detainers from participating in community-based treatment programs, and consequently from sentence reduction eligibility, is at least rationally related to the BOP’s legitimate interest in preventing prisoners from fleeing detainers while participating in community treatment programs.” *Id.* at 1186.

Because Petitioner’s counsel’s failure to seek a downward departure based on Petitioner’s deportable alien status did not prejudice the defense, this ineffective assistance claim fails. *See Pollard*.

c. Early Disposition

Petitioner contends his attorney was ineffective because his attorney failed to seek a downward departure pursuant to U.S.S.G. § 5K3.1 based on Petitioner’s compliance with an “Early Disposition” program.

A request for a downward departure pursuant to § 5K3.1 must come from the government, not defense counsel. *See* U.S.S.G. § 5K3.1 (“*Upon motion of the Government, the court may depart downward . . . pursuant to an early disposition program . . .*”) (emphasis added). Because Petitioner’s attorney’s failure to seek a downward departure based on U.S.S.G. § 5K3.1 did not prejudice the defense, this ineffective assistance claim fails. *See Pollard*.

B. Blakely

Petitioner contends that he is entitled to a downward departure based on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), stating that “[t]he Ninth Circuit Court has held that clarification by **Blakely** applies the **Aprendi** limitation to **Enhancement** of Guidelines Sentencing ranges.”

1 The Supreme Court in *Blakely* applied its prior holding in *Apprendi v. New Jersey*,
2 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435 (2000): "Other than the fact
3 of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed
4 statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."
5 *Blakely*, 542 U.S. at 301, 124 S. Ct. at 2536. Petitioner has not identified how *Blakely*
6 impacts his sentence.


7
8 **Conclusion**

9 In light of the foregoing,

10 **IT IS ORDERED** that Petitioner's § 2255 Motion (U.S.D.C. document #38 in CR-
11 04-1797-TUC-FRZ) is **DENIED** and this case (CV-05-740-TUC-FRZ) is **DISMISSED**.

12 **IT IS FURTHER ORDERED** that the Clerk of the Court **SHALL SERVE** a copy
13 of the Motion and this order on Respondent and **SHALL SERVE** a copy of this order on
14 Petitioner.

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16 DATED this 5th day of January, 2006.

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19 FRANK R. ZAPATA
20 United States District Judge
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